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IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

(UNLIMITED JURISDICTION)

MICHAEL D'ARELLI, an individual, California registered voter, California taxpayer, and Proponent of Proposition 33, Petitioner, v. DEBRA BOWEN, in her official capacity as Secretary of State, Respondent.	No.: 34-2012-80001211 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF MANDATE** **(Proposition 33)** **IMMEDIATE ACTION REQUESTED** Writ Hearing: Date: Thursday, August 9, 2012 Time: 3:00 p.m. Dept.: 29 (The Honorable Timothy M. Frawley) Action Filed: July 27, 2012
KEVIN HANNAH, in his official capacity as Acting State Printer; KAMALA D. HARRIS, in her official capacity as Attorney General; and HARVEY ROSENFIELD; ELISA ODABASHIAN; NAN BRASMER; DEANN MCEWEN; RICHARD HOLOBER; and JAMIE COURT, Real Parties in Interest.	

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INTRODUCTION AND SUMMARY

Supporters of an initiative financed by the Chairman of Mercury Insurance[1] ask this Court to excise criticism of their initiative from the ballot pamphlet, so that California voters seeking an independent analysis of the measure are relegated to the one-sided and frequently deceptive propaganda that has been the hallmark of Mercury's campaign, since 2002, to evade or overturn a consumer protection statute enacted by California voters.

The Petition asks the Court to delete truthful arguments against Proposition 33 that the measure will allow automobile insurance companies to raise rates for many California motorists. As explained more fully below, these statements are the inevitable result of how insurance premiums are determined in California. Under California's ratemaking principles, auto insurance is a "zero sum" system: A discount to one group of persons based on a particular characteristic must be offset by a corresponding surcharge on those who do not meet that characterization. (*See e.g., Foundation for Taxpayer and Consumer Rights v. Garamendi* (1995) 132 Cal.App.4th 1354, 1367-68 ["*FTCR*"].) Two Courts of Appeal, two Insurance Commissioners, two Attorneys General and all credible experts are in accord. (*See infra* Part I B.)

Therefore, by nullifying the express prohibition against consideration of prior insurance coverage in Insurance Code section 1861.02(c) (a statute Petitioner inexplicably fails even to cite) and authorizing prior insurance coverage as a rating factor, Proposition 33 will require insurers that use the new rating factor to impose surcharges along with any discounts.

Many drivers who face the surcharges (including those who did not previously own a car, and many who had another legitimate reason for not buying insurance) will be unwilling or unable to afford the surcharges. This, in turn, will lead to more uninsured motorists on the road – and to corresponding increases in the "uninsured motorist" coverage that many insured motorists buy. (*See FTCR, supra*, 132 Cal.App.4th at 1368.) That is precisely the problem the Insurance Commissioner first identified in 1985, the California Supreme Court discussed in *King v. Meese*

[1] According to campaign disclosure records, Mr. George Joseph, the Chairman of Mercury, supplied 99.1% of the $8,297,806.47 received by the Prop 33 Committee and publicly reported as of August 3, 2012 (http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1340976&session=2011&view=received). The proponent of Proposition 33, and the Petitioner here, Mr. Michael D'Arelli, is the Executive Director of the American Agents Alliance, a Sacramento-based insurance trade association comprised primarily of Mercury agents.

(1987) 43 Cal.3d 1217, and the voters subsequently addressed through Proposition 103 in 1988, by prohibiting insurers from basing premiums or eligibility for insurance on the absence of prior insurance. (*See* Ins. Code, § 1861.02(c).)[2]

It is true that the *exact amount* of the surcharge that Proposition 33 will impose on any particular motorist remains to be determined. (If Proposition 33 passes, every automobile insurance company that seeks to utilize Proposition 33's rating factor will be required to file its own "class plan," which will set forth the unique impact on each of its policyholders.) Nor can it be predicted with certainty *how many* drivers will be unable to afford an auto insurance policy because of the Proposition 33 surcharges, or *how much* that will end up costing Californians. But, contrary to the Petitioner's claims, the fact that no one can pinpoint the exact impact on each person's premium does not preclude opponents from telling the truth: these harms will occur if Proposition 33 is adopted.

Furthermore, Proposition 33 does not, as Petitioner suggests, merely expand the existing "persistency" discount. Petitioner repeatedly conflates the "persistency" discount, which permits insurance companies to reward customer loyalty, with the absence of prior insurance coverage, a consideration that is explicitly barred under existing law. Proposition 33 would instead overturn the prohibition against considering the absence of prior insurance coverage and introduce a new rating factor, which would allow insurance companies to decrease rates for some drivers and increase them for others.

In many instances – and this will be one of them – the Ballot Pamphlet is the only opportunity for opponents of a well-funded measure to speak directly to the voters. That is why California law requires that challenges to the Ballot Arguments meet an extremely high burden. The opponents whose statements are challenged here – all respected advocates for non-profit organizations – are entitled to present their analysis, projections, and opinions to the voters as written. The Petition should be denied.

[2] All statutory references are to the Insurance Code unless otherwise noted.

I. BACKGROUND

Petitioner's recitation of California's insurance regulatory regime omits critical information about how current California law works and the effect that Proposition 33 would have on insurance rates.

A. Current Law Bars the Rating Factor that Proposition 33 Would Authorize

Auto insurance companies' consideration of "absence of prior insurance" became highly controversial in the 1980s. In 1985, the Insurance Commissioner issued a bulletin criticizing insurance companies for the practice. (*See* Department of Insurance Bulletin 85-11, issued July 31, 1985, Exhibit A to Real Parties in Interest's Request for Judicial Notice ["RJN"] ["this Department has received an increasing number of complaints concerning the practice of some insurers of surcharging applicants, or placing applicants in a substandard program solely because they have not previously carried automobile liability insurance."].) In 1987, the California Supreme Court also recognized the problem, but left it to the legislative branch to address. (*King v. Meese* (1987) 43 Cal.3d 1217, 1240 [noting "reluctance of insurance companies to insure persons who were previously uninsured, a problem of particular concern since the purpose of the 1984 legislation was to compel such persons to obtain insurance"] and pp. 1224, 1238, 1239 [same].)

In 1988, California voters enacted an explicit prohibition as one of the insurance reforms contained in Proposition 103:

> The *absence of prior automobile insurance coverage*, in and of itself, shall not be a criterion for determining eligibility for a Good Driver Discount policy, or generally for automobile rates, premiums, or insurability.
>
> (Ins. Code, § 1861.02, subd.(c), emphasis added.)

Startlingly, Petitioner does not bring this statute to the Court's attention. It is highly relevant here for two reasons:

First, though Proposition 33 itself does not mention section 1861.02(c), the text of Proposition 33 is in direct and complete conflict with the existing law, and the passage of Prop. 33 would *overturn the bar* on the use of "absence of prior insurance." Second, prior efforts

by Mercury Insurance Company to evade or amend section 1861.02(c) have led to numerous regulatory and judicial decisions that speak directly to the contentions in the instant Petition.

B. Judicial and Regulatory Decisions Arising from Previous Mercury Actions Confirm that Proposition 33 Will Raise Rates and Increase the Number of Uninsured Motorists

In 2002, the Insurance Commissioner amended the "persistency" rating factor regulation (Cal. Code Regs., title 10 ["10 CCR"], § 2632.5(d)(11))[3] to explicitly bar a subterfuge employed by Mercury Insurance Company. (*FTCR, supra*, 132 Cal.App.4th at 1361.) Mercury had secretly applied the "persistency" optional rating factor – which allows insurance companies to offer discounts for longevity with the *same* company – to provide a discount to motorists who had been insured by *any* company. In a comment filed by Mercury in opposition to the amendment, the company argued that its action did not violate section 1861.02(c). The Commissioner rejected Mercury's argument:

> Under California ratemaking principles, a company's class plan is revenue neutral. Therefore, a discount to one group of persons based on a particular characteristic, *results in a surcharge* to those who do not meet such a qualification. The costs of a discount to a person previously insured is borne by those who do not have prior insurance. *The use of the discount proposed by the commentators, therefore, is in effect a surcharge to those without prior insurance.*
>
> (Final Statement of Reasons, RH-402 (July 26, 2002), p. 10, Response to Comment 8(c), RJN Exh. B, emphasis added.)

When policyholders sued Mercury for this same practice, the Court of Appeal also rejected Mercury's argument. (*Donabedian v. Mercury Insurance Company* (2004) 116 Cal.App.4th 968, 974-975 [concurring with the Commissioner's analysis].)

Having lost before the executive and judicial branches, Mercury sponsored legislation that would have enacted a so-called "portable persistency" rating factor nearly identical to the "continuous coverage" rating factor proposed by Proposition 33. Governor Gray Davis vetoed

[3] The Commissioner's formal rulemaking proceeding that preceded the adoption of the amendment was denominated RH-402.

the first proposal in 2002, but asked the Insurance Commissioner to study its impact. The report confirmed the "zero-sum" nature of rating factors:

> Since insurance is a mechanism, which provides for the sharing of total losses among all insureds within an insurance company, the discounts given to one group of insureds are not simply money saved. The total losses of the insurance company will not change. The sharing mechanism works by making the remaining group who do not qualify for the discounts *pay more*.
>
> (Persistency Study, Petitioner's Exhibit 7, page 3, emphasis added.)
>
> *People who do not have prior insurance are surcharged under portable persistency.* Many of these people are those that can least afford to pay for insurance or who already have high premiums caused by other rating factors. This discourages them from buying insurance, *which may add to the number of uninsured motorists and ultimately drives up the cost of the uninsured motorist coverage for every insured.*
>
> (*Id.*, page 5, emphasis added.)

Mercury's legislation passed the following year. However, Consumer Watchdog (then known as "The Foundation for Taxpayer and Consumer Rights"), Consumers Union and other organizations successfully challenged the law as an improper amendment to Proposition 103. The Court of Appeal held that the legislation conflicted with section 1861.02(c). (*FTCR, supra,* 132 Cal.App.4th 1354.) Relying upon the expert testimony of two experienced insurance actuaries, the Court of Appeal concluded that ". . . Sen. Bill 841 would permit insurers to surcharge previously uninsured drivers to fund discounts for drivers with prior or persistent insurance." (*Id.* at 1366.) As recited by the court, "insurance is a 'zero sum' system" (*id.* at 1367): "The premiums for policyholders who, because of their characteristics, do not qualify for a particular discount must be *surcharged* in an amount *equal to the total of the discounts* given to the policyholders that qualified for the discount." (*Ibid.*, citation omitted, italics in original; *see also* 10 CCR § 2632.7(c).)

The Court of Appeal concluded: "The greater the proportion of policyholders that receive the discount, the greater the surcharge will be for the policyholders that do not receive the discount." (*Id.*) Thus, the surcharge under Proposition 33 for those who *do not have* prior

insurance will be substantial. This is a product of the zero-sum nature of the insurance rating factor regulation described above. All discounts must be offset by surcharges; therefore, if a larger number of individuals receive a prior insurance discount under Proposition 33, the collective offset will be distributed among a smaller number of individuals who *do not qualify* for a prior insurance discount, each bearing a much greater surcharge. (*FTCR*, *supra*, 132 Cal.App.4th at 1368.)

C. Contrary to the Petition, the Lawful "Persistency" Rating Factor Is Irrelevant to the Impact of the Prior Insurance Rating Factor

As discussed above (Part I B, 4:5-7), "persistency" is an optional rating factor that has been adopted by the Insurance Commissioner pursuant to Proposition 103 (Ins. Code, § 1861.02(a)(4)). It allows insurers to consider, at a policy renewal, the length of time a *current* insured has done business with the same company. (10 CCR § 2632.5(d)(11).)

The regulations and appellate decisions cited above emphasize that "persistency" with the same company has nothing to do with the "absence of prior insurance" with another carrier, the consideration of which is prohibited by Insurance Code section 1861.02(c). Rather, it permits insurance companies to reward customer loyalty. Petitioner, however, repeatedly conflates "persistency" with "prior insurance," the rating factor that Proposition 33 would legalize. (*See*, *e.g.*, Memorandum of Points and Authorities in Support of Verified Petition for Peremptory Writ of Mandate ("Petitioner's MPA") at 5:3, emphasis added ["Proposition 33 will *expand upo*n the already established "persistency" rating factor."].) These statements are false. By its own language, Proposition 33 creates a *new* "continuous coverage" rating factor. Proposition 33 does not "expand," or even mention, the current "persistency" rating factor. The two rating factors are different.

In a further attempt at misdirection, the Petition frequently compares individuals who receive the "persistency" discount with those who will qualify for the proposed "continuous coverage" discount. The comparison is improper.

The relevant comparison is between a previously *uninsured* motorist and the previously *insured* motorist who seek to buy a policy from a company for the first time. Today, under current law (section 1861.02(c)), when those two persons approach an automobile insurer, they

must be treated the same. The insurer may not consider the absence of prior insurance. Under Proposition 33, they may be treated quite differently.

An example: assume two identical motorists, one who is uninsured, and one who is insured with State Farm, both of whom apply to Mercury Insurance for a policy. Under current law, Mercury's premium for both should be the same, because Mercury may not consider the uninsured's absence of prior insurance. Under Proposition 33, the former State Farm customer who approaches Mercury to buy a policy will be entitled to a new "discount" for having prior insurance. But the previously uninsured motorist who seeks a policy from Mercury will be subject to a new surcharge, to make up for the discount to the insured motorist.

II. STANDARD OF REVIEW

The Petition asks this Court to strike five statements in the Argument Against Proposition 33 and one in the Rebuttal to the Argument in Favor of Proposition 33. Petitioner confronts an especially high burden when seeking to delete or even amend Real Parties' ballot arguments. California law articulates four basic principles that are particularly pertinent.

(1) The ballot argument portion of the voter's pamphlet is a limited public forum, one that by design includes partisan arguments for and against each initiative measure. (*Patterson v. Board of Supervisors* (1988) 202 Cal.App.3d 22, 29-31; *Gebert v. Patterson* (1986) 186 Cal.App.3d 868, 873-874.) As such, "because protected rights of speech are implicated, the government's restrictions must be narrowly drawn." (*Patterson, supra*, 202 Cal.App.3d at 30.)

(2) Because of these restrictions, state law provides that a court may interfere with the parties' expression of their views and opinions "*only* upon *clear and convincing* proof that the copy in question is false, misleading, or inconsistent with the requirements of this code . . . ." (Elec. Code, § 9092, emphasis added.) In *Huntington Beach City Council v. Superior Court* (2002) 94 Cal.App.4th 1417, 1428, the court noted that "the Legislature went out of its way to emphasize the narrowness of the scope of any proper challenges by appending the word 'only' in front of the heightened evidentiary standard."

(3) "The context in which a statement is made is critical to whether it is understood as a statement based on fact or an expression of the speaker's opinion." (*Mandicino v. Maggard* (1989) 210 Cal.App.3d 1413, 1417.) Thus, the Court of Appeal cautioned in *Mandicino* that "[a]

statement in a ballot argument is generally understood by the voting public to be the opinion of the writer. . . . Statements made in [the context of initiative issues] generally are, and should be, treated as opinions. This is particularly true when they concern an initiative measure. Almost all, if not all, statements concerning the *effect* or *application* of an initiative can only be the opinion of the interpreter and the voting public is generally aware of this." (*Ibid.*, quoting *Chavez v. Citizens for a Fair Farm Labor Law* (1978) 84 Cal.App.3d 77, 82.) Underscoring the "opinion" nature of many statements contained in the ballot arguments, the Elections Code requires that the following statement shall be printed on each page of the Ballot Pamphlet where arguments appear: "Arguments printed on this page are the *opinions* of the authors. . . ." (Elec. Code, § 9086, subd. (f), emphasis added.)

Thus, even with respect to factual assertions that are challenged, courts must be extremely cautious before curbing the right of the electorate to hear the challenged speech and judge for themselves. Courts must distinguish false or misleading factual assertions from "typical hyperbole and opinionated comments common to political debate." (*San Francisco Forty-Niners v. Nishioka* (1999) 75 Cal.App.4th 637, 649-650.) When factual assertions are reasonably subject to dispute, courts should "rarely interfere." (*Ibid.*)

(4) Predictions or projections of the impact of a ballot initiative fall within the protection of opinions. Noting that "[i]n the political arena it is commonplace for an opinion to say that a particular result 'will' take place," the court in *Mandicino* held that "[t]he statements were opinions about the future effects upon the community if the measure was enacted", and that "opinion statements concerning the potential benefit or harm from an initiative measure are not [subject to proof of their truth or falsity]" (*Mandicino*, *supra*, 210 Cal.App.3d at 1420.) As a result, the Court of Appeal concluded that the changes ordered by the trial court were not required by the Elections Code.

Here, each of the statements challenged by Petitioner either is demonstrably true, or – as in *Mandicino* – a statement of opinion about the impact or future effect of Proposition 33. Because such opinions are not subject to proof of truth or falsity, as a matter of law they cannot be stricken from the ballot argument.

III. ANALYSIS AND ARGUMENT

A. The Challenged Ballot Arguments Are Statements of Fact and Opinion

1. "Proposition 33 unfairly punishes anyone who stopped driving for a good reason but now needs insurance to get back behind the wheel"

Petitioner asks the court to strike this sentence because "[t]here is nothing unfair about Proposition 33, and it certainly does not punish people who stop driving." (Petitioner's MPA, 11:16-17.) While the insurance industry supporters of Proposition 33 may think it fair, the authors of the argument against Proposition 33 are entitled to place contrary facts and their opinion before the voters. (*Mandicino*, *supra*, 210 Cal.App.3d at 1420.)

Moreover, it is beyond dispute that Proposition 33 will "punish people who stop driving." As explained above (Part I B), every "continuous coverage discount" provided by Proposition 33 must be offset by substantial surcharges to other motorists who do not qualify for the discount. In any case, whether Proposition 33 will punish Californians is a matter of permitted opinion. (*Mandicino*, *supra*, 210 Cal.App.3d 1413.)

Petitioner also insists – *without any evidence whatsoever* – that "[m]ore people who stop driving for a period of time are eligible for a full or partial discount under Proposition 33 than under existing law" (Petitioner's MPA, 11:21-23, emphasis in original). Petitioner conflates the current "persistency" rating factor – which rewards customer loyalty – with the new "continuous coverage" rating factor, which California law bars but which Proposition 33 would legalize. The comparison is incorrect, as explained above (Part I C, 6:8-22). In any case, Petitioner's unsupported claim is irrelevant to the point made in the Argument that under Proposition 33, that there will be drivers who stopped driving for a multitude of good reasons but who will be punished with surcharges.

Given the limited space allowed in a ballot argument, opponents' views of the impact of Proposition 33 should not be subjected to a requirement that they enumerate each circumstance under which a person with a lapse in coverage will be deemed to have "continuous coverage" under Proposition 33. The Petition provides *no evidence* to indicate the numbers of individuals who will fall within those limited circumstances, compared to those who would not. For example, people who never owned a car or were required to buy automobile insurance, as well as

members of the armed services on *inactive* duty, those who are unemployed for *more than eighteen months*, those whose unemployment for any length of time is *not demonstrably the result of a layoff or furlough*, and those who had a lapse in coverage of *91 days or more*, are subject to a full surcharge.

Most important, notwithstanding Proposition 33's language purporting to deem certain individuals with a lapse as having continuous coverage, there is nothing in Proposition 33 that *requires* that an insurer provide any particular individual with a discount.

Moreover, context is critical in assessing a ballot challenge. (*Mandicino*, *supra*, 210 Cal.App.3d at 1417.) Here, the context should be construed as the complete set of arguments for, as well as against, Proposition 33. The Petitioner did not include both sets of arguments, and perhaps this is why: the supporters of Proposition 33 speak in terms just as broad as the opponents, and have themselves eschewed the fine points regarding the impact of Proposition 33.[4] There is no requirement that the ballot arguments recite every possible exception to a general statement of opinion as to the impact of the statute. The opponents of Proposition 33 should not be required to meet a hyper-textual critique of their words while Mercury itself speaks in similar generalities. Such a requirement would improperly prejudice the opponents.

Courts grant broad leeway to ballot arguments, and with good reason. As stated above, most or all statements concerning the expected impact of an initiative are considered protected opinion. (*Mandicino*, *supra*, 210 Cal.App.3d at 1417.)

[4] The Proposition 33 sponsors say the measure "allows this discount *to everyone* who has followed the law" (Rebuttal to Argument Against Proposition 33, p. 1, RJN Exh. C, emphasis in original) and "applies the continuous coverage discount to *everyone* who follows the law" (*id.* at p. 2, emphasis supplied). But Proposition 33 does *not* provide for a discount to *everyone* who follows the law. People who never drove or owned a car were not required to buy insurance. They were not breaking the law. But they still are assessed a surcharge under Proposition 33. The sponsors' argument also states that "Proposition 33 protects military families, consumers who are unemployed or furloughed, and student drivers. . . ." (*Ibid.*) In fact, Proposition 33 doesn't protect some of these individuals: inactive military, members of the armed services on inactive duty, those who are unemployed for more than eighteen months, and those whose unemployment for any length of time is not demonstrably the result of a layoff or furlough are not protected.

2. "Proposition 33 raises insurance rates for students completing college who now need to drive to a new job"

Petitioner argues that "students graduating from college without a history of insurance coverage will be eligible for the same rates they are eligible for under existing law." (Petitioner's MPA, 12:7-8.) As a *matter of law,* this statement is incorrect. As explained above (Part I A), existing law bars the consideration of prior insurance. Under Proposition 33, companies that offer discounts will necessarily levy surcharges on those who were not previously insured. Students and others not previously insured will be required to pay those surcharges.

Take, for example, a 22-year-old student with a good driving record who did not own a car and thus did not require insurance during college; she graduates and applies for insurance for the first time. Under current law, she would be quoted precisely the same premium as good drivers who were insured (all other things being equal). Consideration of the absence of prior insurance is prohibited under current law. But under Proposition 33, the graduate's absence of prior insurance with any company will be explicitly considered, and will result in a surcharge to offset her counterpart's "continuous coverage" discount. Real Parties' argument against Proposition 33 is correct.

In any case, Petitioner provides *no evidence whatsoever* in support of its contention that "more college students" will get lower rates. The most that can be said about Petitioner's argument is that it raises the question of whether Proposition 33 will benefit or harm students entering the insurance market for the first time. The Court should decline to embroil itself in the partisan contest concerning which students are most harmed.

3. "Proposition 33 raises insurance rates for people who dropped their coverage while recuperating from a serious illness or injury that kept them off the road"

As in the previous discussion, Proposition 33's "continuous coverage" discounts will be offset by surcharges. It cannot be disputed that people who dropped their auto insurance coverage due to illness (or any other reason) for ninety-one days or more will be surcharged. Again, Real Parties' argument is correct. Moreover, even if this were an open question, it would amount at most to a factual dispute over who will be harmed, and the statement is therefore protected speech about the impact of the measure. (*Mandicino, supra*, 210 Cal.App.3d 1413.)